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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 560

EDWARD E. COLTON AND LILLIAN KALTMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 18–31) is reported at 306 F. 2d 633.

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 1962. (Pet. 2). The petition for certiorari was filed on October 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the attorney-client privilege protects against disclosure

of certain information relevant to determining the client's correct tax liability for the year involved.

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1958 ed., Sec. 7602.)

SEC. 7604. ENFORCEMENT OF SUMMONS

(a) *Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(26 U.S.C. 1958 ed., Sec. 7604(a)(b).)

STATEMENT

Petitioners, both attorneys in the same law firm, were summoned by a special agent of the Internal Revenue Service to testify and produce certain documents concerning the tax liability of their clients, Herbert and Mercedes Matter. (R. 8a–11a.).[1] The summonses were issued for the purpose of verifying the Matters' reported gross income for the years 1953 through 1958, and, further, to learn why the returns were filed late. (R. 51a, 53a.) Petitioners appeared but refused to turn over the designated records and declined to answer certain questions on the ground that compliance would violate the attorney-client privilege. Invoking this privilege, petitioners refused to disclose the nature of the legal services rendered prior to 1951 (Question 18 (R. 64a)). Also, they declined to say whether they had performed any legal services for the Matters during the years 1951 and 1954 through 1957 (Questions 16, 52, 54 (R. 64a, 71a)); whether any remuneration was received from the Matters for legal services during the years 1954 through 1957 (Question 55, R. 71(a)); and whether the firm caused a 1953 income tax return to be prepared for or on behalf of the Matters in 1954 (Question 80, R. 77 (a)). Petitioners also claimed the privilege in refusing to produce "retained copies of income tax returns, workpapers, correspondence, memoranda and all other data" relating to the preparation and filing of federal income tax returns for their clients during

[1] Record references are to the Appendix to petitioner's brief in the court below.

the years 1951 through 1958 (Questions 22, 65 (R. 65a, 74a)).

On June 7, 1961, the government, proceeding under Section 7604 of the Internal Revenue Code, sought an order from the district court to compel answers to the foregoing questions and production of the designated documents. After first noting that federal law applied (R. 82a–83a), the court held that the attorney-client privilege did not prevent disclosure of the years during which legal services were rendered (R. 87a), the amount of the fee (R. 87a), or the general nature of the services performed. (R. 88a.) The district court further held that retained copies of income tax returns, together with other papers furnished to the attorneys by their clients, were not privileged. (R. 88a.) The court of appeals unanimously affirmed. (Pet. 18–31).

ARGUMENT

1. Whether or not the enforcement order of the district court is a "final" order for purposes of appeal,[2] there is no occasion for review by this Court in the present posture of the case. Petitioners made a blanket refusal to answer any questions or to produce any documents having to do with the tax liabilities of their clients for the years 1953 to 1958. (R. 13a–39a, 61a–80a.) The district court directed

[2] See *Davis* v. *Soja*, No. 271, this Term, certiorari granted October 8, 1962, where the question presented is whether an order merely directing compliance with an Internal Revenue Service summons is final, or whether there must be an order finding the witness in contempt for refusal to comply with the summons.

them to answer questions as to the dates and the general nature of legal services performed for their clients, and as to the fees involved, but carefully excluded detailed inquiry as to the substance of confidential communications or work performed by petitioners. (R. 87a–89a.) Consequently, it is still open to petitioners, as the court of appeals pointed out (Pet. 29), to invoke the privilege with respect to particular questions touching too closely on a confidential relationship between them and their clients.

2. Little need be added to the careful analysis of the court of appeals, based on the overwhelming weight of authority, concluding that the attorney-client privilege does not protect against disclosing the matters here involved. Petitioners, relying heavily (Pet. 11–16), if not exclusively, upon *Baird* v. *Koerner*, 279 F. 2d 623 (C.A. 9th), allege that the information sought by the Internal Revenue Service, as in *Baird*, could form the first step towards discovering a possible criminal violation. The Ninth Circuit in *Baird*, at p. 633, held that, under California law, the attorney-client privilege protects against the disclosure of the client's identity when "the name of the client is material only for the purpose of showing an acknowledgement of guilt on the part of such client of the very offenses on account of which the attorney was employed." But the court below was well aware of the *Baird* decision, and expressly distinguished it as follows (Pet. 25):

> To be sure, there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential

> communication, as where the substance of a disclosure has already been revealed but not its source. See, e.g., *In re Kaplan*, 8 N. Y. 2d 214, 203 N.Y.S. 2d 836, 168 N.E. 2d 660 (1960); *Baird* v. *Koerner*, 270 F. 2d 623 (9 Cir. 1960).
>
> We find, however, no such special circumstances in the case at bar. * * *

The *Baird* opinion and the opinion of the court below agree that the scope of the privilege depends upon the facts of the particular case, and petitioners (Pet. 11) agree that this is so. There is no conflict with *Baird* in this respect.

3. The court below held that questions of privilege in a federal income tax investigation are controlled by federal law. (Pet. 22.) The Fifth Circuit also espouses this view. *Falsone* v. *United States*, 205 F. 2d 734, 741–742, certiorari denied, 346 U.S. 864. As was noted by the court below (Pet. 22–23), the Ninth Circuit, in *Baird* v. *Koerner, supra*, announced a conflicting rule that such matters are governed by State law. While there is conflict with respect to this subsidiary issue, we respectfully suggest that the instant case does not present an appropriate occasion to resolve it. Petitioners have made no showing that the court below would have reached a different result had it applied New York law. To the contrary, the court of appeals took into account the most recent New York Court of Appeals decision interpreting the scope of the attorney-client privilege, *In re Kaplan*, 8 N.Y. 2d 214, 203 N.Y.S. 2d 836, 168 N.E. 2d 660, which is the very decision most closely resembling *Baird* v. *Koerner, supra*, and found that it—like the *Baird* case—was distinguishable (Pet. 25.) Moreover, as the Sec-

ond Circuit has noted in another case, *United States* v. *Kovel*, 296 F. 2d 918, 921, there is nothing to indicate that the New York statutory recognition of the attorney-client privilege, New York Civil Practice Act, Section 353,[3] was "intended to do more than enact the principles of the common law."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JOSEPH M. HOWARD,
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Attorneys.

NOVEMBER 1962.

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[3] "An attorney or counselor at law shall not disclose, or be allowed to disclose, a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counselor * * * disclose, or be allowed to disclose, any such communication or advice."

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